



the following evidence and testimony was adduced. J.T. testified that she is 53 years old and the mother of the respondent, Terry Jodette Learn (Jodi), who is now deceased. Jodi was the mother of the children in this case and Rick is the father. The oldest daughter, S.K., was born on September 1, 2002. J.T. testified that she was present at S.K.'s birth. The following summer, J.T. was off work and assisted Jodi in taking care of S.K. three to four days per week.

The youngest daughter, R.K., was born on November 26, 2003, at St. Elizabeth's Hospital and was transferred to Cardinal Glennon Hospital the next day. J.T. testified that she was not present for R.K.'s birth because Rick requested that she leave. However, J.T. testified that she went to Cardinal Glennon Hospital for a few hours every day to see R.K. until she was released. J.T. testified that after R.K.'s birth, Rick was angry with her and did not want her near him, Jodi, or the girls. Nevertheless, J.T. continued to see Jodi and the girls when Rick was gone to work. J.T. testified that she was off work most of the summer of 2004 and that she visited with Jodi and the girls from about 11 a.m. until 3 p.m. two or three days per week. J.T. testified that Jodi took the girls to Texas to visit family in October 2004 and stayed approximately a month and a half. J.T. noted that Jodi and Rick separated after the visit in Texas and that Rick got custody of the girls.

J.T. testified that from March 2005 until March 2006, Jodi resided with J.T.'s ex-husband, Paul Grimmer. J.T. explained that Grimmer's residence was only two miles from her home, so Jodi brought the girls over to see J.T. anytime they were visiting. J.T. specified that this was approximately one weekend per month. J.T. testified that during the visits, although the girls and Jodi slept at Grimmer's house, they all visited at J.T.'s house during the day because the girls had a playmate there, J.T.'s adopted daughter, who is close in age to the girls. J.T. testified that sometimes Jodi was working when the girls were visiting, during which time J.T. filled the role of caretaker.

J.T. testified that Jodi lived with her for 11 months from March 2006 until February 2007. At that time there was a custody battle between Jodi and Rick. J.T. testified that she got to see the girls approximately one weekend per month and for three to four Wednesday overnight visits per month during that time. J.T. testified that she served as grandmother and sometimes babysitter when Jodi was working. J.T. described her home then as having a large yard with a privacy fence, two bedrooms, a fireplace room, a living room, a kitchen, a dining room, and a finished basement. J.T. testified that the fireplace room was used as a bedroom for the girls. The room had bunk beds, dressers, a toy chest, and clothes, which J.T. provided. J.T. reported that her relationship with the girls was very good and that they enjoyed visiting at her home. J.T. testified that she and the girls read books together, went shopping together, and ate meals together as a family. J.T. also tucked the girls in at night. J.T. described the girls as very good, cute, adorable kids. She testified that the girls played well together. There was a swing set in the back yard of J.T.'s home, games, toys, and a kiddie pool during the summer. J.T. testified that she, Jodi, and the girls went to the park on Mother's Day 2005 and had photographs taken at a studio. J.T. also had a birthday party for S.K. in September 2006 and provided cake and gifts.

J.T. testified that in February 2007, Jodi moved into an apartment of her own. J.T. testified that after that time, Jodi and the girls never came to her home because Jodi was having car trouble. Accordingly, J.T. went to the apartment to visit the girls and continued doing so until the middle of 2007. J.T. testified that Jodi passed away on April 26, 2008, after which J.T. attempted to visit the girls. J.T. testified that she called Rick's stepmother around Father's Day 2008 to request a visit with the girls and to take them to a family reunion. Subsequently, J.T. spoke with Rick on the telephone on July 27, 2008. J.T. testified that Rick screamed at her, called her names, told her she would never see the girls again, and hung up on her. After that, J.T. received a phone call from the police, informing her that if

she attempted to call Rick again she would be arrested and charged with harassment.

J.T. testified on cross-examination that she takes prescription medications for hypothyroidism, ADHD, degenerative spine disease, and rheumatoid arthritis. J.T. acknowledged alleging in the petition that Rick's denial of visitation is unreasonable and harmful to the girls' mental, physical, and emotional health. However, she admitted that she did not consult a psychiatrist, therapist, or social worker in that regard. J.T. testified that she did consult with her own psychologist, who was not subpoenaed to testify.

J.T. testified that neither she nor anyone else in her family has seen the girls since the summer of 2007. She denied seeking visitation with the girls to harm Rick in any way. She averred, rather, that she is seeking visitation with them because they are a part of her and she loves and misses them very much. J.T. recalled no time when the girls did not want to see her. To the contrary, J.T. testified that the girls enjoyed their time with her immensely and that they cried when they had to leave. J.T. stated that she knew of no basis for Rick to deny her visitation with the girls. Although in the petition, J.T. requested visitation with the girls for every other weekend and every other holiday and during the summer, her testimony reflects a request for visitation on a monthly basis and around some holidays. She believed that the requested visitation would be in the girls' best interest and that, without a court order, neither she nor her family would ever be able to see the girls again.

At the conclusion of the hearing, Rick's counsel made an oral motion to dismiss or in the alternative a motion for a directed verdict, which the trial court granted. We note that in so granting, the trial court referenced Rick's motion as a "motion to dismiss." However, when a defendant moves for a judgment in his favor at the conclusion of the plaintiff's case at a bench trial, it is known as a motion for a directed finding. See *Pacini v. Regopoulos*, 281 Ill. App. 3d 274, 277 (1996). In its decision, the trial court stated that it had considered the factors of section 607(a-5)(4) of the Illinois Marriage and Dissolution of Marriage Act (Act)

(750 ILCS 5/607(a-5)(4) (West 2008)), as well as case law. The trial court granted the motion, based on its conclusion that J.T. had not rebutted the presumption that a fit parent's decisions regarding grandparent visitation are not harmful to a child's physical, mental, or emotional health, pursuant to section 607(a-5)(3) of the Act (the presumption) (750 ILCS 5/607(a-5)(3) (West 2008)). J.T. filed a timely notice of appeal.

#### ANALYSIS

J.T.'s sole issue on appeal is restated as follows: whether the trial court erred by granting Rick's motion for a directed finding. "Pursuant to section 2-1110 of the Illinois Code of Civil Procedure [citation], the defendant may move for a directed finding at the end of the plaintiff's case in any matter tried without a jury." *Pacini*, 281 Ill. App. 3d at 277. "When ruling on the motion, the trial court must employ a two-step analysis." *Id.* "First, the trial court must determine whether the plaintiff has established each element of a *prima facie* case." *Id.* at 277-78. "To establish a *prima facie* case, the plaintiff[] must present evidence to support each element of the cause of action." *Id.* at 278. "If the trial court finds that the plaintiff has not established a *prima facie* case, it should direct a finding in favor of the defendant." *Id.* "If, however, the trial court finds that [the] plaintiff has established a *prima facie* case, it proceeds to the second step of the analysis, which is to weigh all the evidence, including any evidence favorable to the defendant, assess the credibility of the witnesses, and generally consider the weight and quality of all the evidence." *Id.* "In deciding a motion for a directed finding, the trial court is not to view the evidence in the light most favorable to the plaintiff." *Id.* "If the weighing process results in the negation of some of the evidence necessary to the plaintiff's *prima facie* case, the court should grant the defendant's motion and enter judgment in his favor." *Id.* "In contrast, if sufficient evidence establishing the plaintiff's *prima facie* case remains after the weighing process, the court should deny the defendant's motion and proceed as if the motion had not been made." *Id.* With regard to

whether all the evidence was properly weighed, "[a] trial court's determination on the motion will not be reversed on appeal unless the decision is contrary to the manifest weight of the evidence." *Id.* "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Best v. Best*, 223 Ill. 2d 342, 350 (2006).

Applying these principles to the case at bar, we consider that to establish a *prima facie* case, J.T. must rebut the presumption "that a fit parent's actions and decisions regarding grandparent \*\*\* visitation are not harmful to the child's mental, physical, or emotional health" and that the burden is on J.T. to prove that those actions and decisions are so harmful. 750 ILCS 5/607(a-5)(3) (West 2008). In determining whether to grant visitation to the grandparent, section 607(a-5)(4) of the Act provides the following factors for the trial court to consider:

- "(A) the preference of the child if the child is determined to be of sufficient maturity to express a preference;
- (B) the mental and physical health of the child;
- (C) the mental and physical health of the grandparent \*\*\*;
- (D) the length and quality of the prior relationship between the child and the grandparent \*\*\*;
- (E) the good faith of the party in filing the petition;
- (F) the good faith of the person denying visitation;
- (G) the quantity of the visitation time requested and the potential adverse impact that visitation would have on the child's customary activities;
- (H) whether the child resided with the petitioner for at least 6 consecutive months with or without the current custodian present;
- (I) whether the petitioner had frequent or regular contact or visitation with the

child for at least 12 consecutive months;

(J) any other fact that establishes that the loss of the relationship between the petitioner and the child is likely to harm the child's mental, physical, or emotional health; and

(K) whether the grandparent \*\*\* was a primary caretaker of the child for a period of not less than 6 consecutive months." 750 ILCS 5/607(a-5)(4) (West 2008).

In the case at bar, Rick emphasizes that J.T. did not consult a psychiatrist, therapist, or social worker regarding the effects of the lack of visitation on the girls' mental, physical, or emotional health. Although J.T. testified that she did consult with her own psychologist, he or she was not subpoenaed to testify. Rick contends that section 607(a-5)(3) requires J.T. to first prove that Rick's actions regarding visitation are harmful to the girls' mental, physical, or emotional health and that there is no required finding that any or all the factors in section 607(a-5)(4) constitute sufficient evidence to rebut the presumption. We disagree.

While a party is certainly permitted to provide the testimony of a psychiatrist, psychologist, or social worker to show that the lack of visitation is harmful to a child's mental, physical, or emotional health, the statute does not require that testimony. Moreover, section 607(a-5)(4)(J) instructs the trial court to look at "any other fact that establishes that the loss of the relationship between the petitioner and the child is likely to harm the child's mental, physical, or emotional health." 750 ILCS 5/607(a-5)(4)(J) (West 2008). Accordingly, the listed factors are to be considered in determining whether the presumption has been rebutted, and Rick's contentions to the contrary are without merit.

In applying the section 607(a-5)(4) factors to the case at bar, we conclude that the mental and physical health of the children, as well as their preferences regarding visiting with J.T., are unknown. J.T. was unable to provide testimony in this regard, due to her inability to visit with or speak to the girls. The trial court could have but did not conduct *in camera*

interviews with the children. Although the trial court appointed guardians *ad litem* in orders dated December 30, 2004, and January 13, 2005, with regard to custody proceedings between Rick and Jodi, no testimony was elicited from either guardian *ad litem* in the proceedings on J.T.'s petition. Regarding J.T.'s physical and mental health, Rick's counsel questioned J.T. about certain prescription medications, which yielded no evidence that J.T.'s mental and physical health would impair her ability to adequately care for the girls if visitation were granted.

J.T.'s testimony established that she and the girls shared a close family relationship. J.T. had been involved with the girls since their birth, had helped to care for them as infants, and had visited them regularly, several days per week, prior to Jodi and Rick's separation. J.T. testified that after the separation, she visited with the girls every time Jodi had them for visitation, which was at least one weekend per month and three to four overnight Wednesday visits per month. J.T. testified that there was a bedroom for the girls at her home which was equipped with toys, clothing, and furniture. J.T. tucked the girls in at night. They ate together, played together, went shopping, read books, and celebrated birthdays. J.T. testified that the girls cried when they had to leave her house. This testimony shows that the relationship between the girls and J.T. was of good quality and well-established.

The evidence shows that J.T. filed the petition for visitation in good faith, and the same was conceded by Rick's counsel at oral argument. J.T. testified that she filed the petition because she loves and misses the girls and that she did not do so to harm Rick in any way. Regarding the good faith of Rick in denying J.T. visitation with the girls, J.T. testified that after the youngest child was born, Rick was angry with her and told her that he did not want her near him, Jodi, or the girls. In his motion to quash the appointment of a guardian *ad litem*, Rick stated, "[The girls] were subjected to more than enough long ago by [Jodi] and [J.T.], and [Rick] does not want his children's mental health in any way tampered with by

some outsider no matter who it might be." Rick also stated in the motion: "[Rick] will not under any circumstances voluntarily agree to permit [J.T.] to have access to his children. [Rick] will at the time of trial \*\*\* offer evidence that [J.T.] was engaged in a course of conduct detrimental to the children." However, Rick fails to articulate in the motion any specific reasons for his denial of visitation, nor does he specify how the girls will be harmed by granting J.T. visitation with them. Further proceedings would shed light on this factor.

With regard to the amount of visitation time requested in the petition, J.T. requested visitation with the girls for every other weekend and every other holiday and during the summer. However, her testimony reflected a request for visitation on a monthly basis and around the time of some holidays. There is no evidence of how the requested visitation would impact the girls' customary activities. The girls never resided with J.T. for six consecutive months, nor was J.T. their primary caretaker for at least six months. However, the record shows that J.T. had frequent or regular contact with them for at least 12 consecutive months. J.T. testified that she was present for S.K.'s birth on September 1, 2002, after which she visited S.K. and assisted in her care on a regular basis. After R.K. was born on November 26, 2003, in spite of Rick's objections, J.T. visited Jodi and the girls regularly while Rick was at work. That interaction continued throughout Jodi and Rick's separation and until the middle of 2007. We specifically note the factor in section 607(a-5)(4)(J), which allows for "any other fact that establishes that the loss of the relationship between the petitioner and the child is *likely* to harm the child's mental, physical, or emotional health." (Emphasis added.) 750 ILCS 5/607(a-5)(4)(J) (West 2008). We find that the factors examined in our analysis above show that J.T. put on evidence sufficient to rebut the presumption.

For the foregoing reasons, we find that J.T. established a *prima facie* case by presenting sufficient evidence to support her cause of action. See *Pacini*, 281 Ill. App. 3d

at 278. Accordingly, both the trial court's conclusion that J.T. failed to rebut the presumption and the trial court's subsequent order granting Rick's motion for a directed finding were against the manifest weight of the evidence.

#### CONCLUSION

The April 26, 2010, order of the circuit court of St. Clair County that granted Rick's motion for a directed finding is hereby reversed, and this cause is remanded for further proceedings.

Reversed; cause remanded.